

5383

1 IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE  
2 FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

3

---

BOBBY NEWCOMB,

4

Plaintiff,

5

- vs -

Case No. 88913-8 T.D.

6

7 R.J. REYNOLDS TOBACCO COMPANY, and  
8 THE BROWN AND WILLIAMSON TOBACCO  
9 COMPANY, as successor by merger to  
THE AMERICAN TOBACCO COMPANY,

10

Defendants.

---

11

12

13 Before: The Honorable D'Army Bailey

14

15

16 TRANSCRIPT OF PROCEEDINGS

17

18 March 18, 1999

19

(Morning Session)

20

Volume 35

21

22

23

ALPHA REPORTING CORPORATION

24

(901) 523-8974

SOUTHERN REGISTERED REPORTERS

5384

1

(901) 526-2179

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

5385

1  
2 EDITH KARNEY, Individually, and  
3 On behalf of the Estate of  
4 JAMES WILEY KARNEY,  
5 Plaintiffs,  
6 - vs - Case No. 89196-8 T.D.  
7  
8 PHILLIP MORRIS, INC., and  
9 PHILLIP MORRIS COMPANIES, INC.,  
10 Defendants.

---

11 RUBY SETTLE, Individually, and  
12 On behalf of the Estate of  
13 RAYMOND SETTLE,  
14 Plaintiffs,  
15 - vs - Case No. 89226-8 T.D.  
16  
17 B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS,  
18 INC.; BROWN & WILLIAMSON TOBACCO  
19 CORPORATION; BRITISH AMERICAN TOBACCO  
20 COMPANY, L.T.D.,  
21 Defendants.

---

22 DENISE McDANIEL, Individually,  
23 and On behalf of the Estate of  
24 FLORENCE BRUCH,  
25 Plaintiff,  
26 - vs - Case No. 90832-8 T.D.  
27  
28 BROWN AND WILLIAMSON TOBACCO  
29 CORPORATION, and  
30 PHILLIP MORRIS, INC.,  
31 Defendants.

5386  
1  
2 A P P E A R A N C E S  
3

4 FOR THE PLAINTIFFS:

5 Curtis D. Johnson, Jr., Esq.  
6 JOHNSON & SETTLE  
7 67 Madison Avenue  
8 Suite 201  
9 Memphis, TN 38103  
10 Florence M. Johnson, Esq.  
11 AGEE, ALLEN, GODWIN, MORRIS  
12 LAURENZI & HAMILTON  
13 200 Jefferson Avenue  
14 Suite 1400  
15 Memphis, TN 38103

16 Wilner, Esq.  
17 SPOHRER, WILNER, MAXWELL  
18 MACIEJEWSKI & STANFORD, PA  
19 444 East Duval Street  
20 Jacksonville, FL 32202

21 FOR THE DEFENDANT  
22 R.J. REYNOLDS:

16 Albert C. Harvey, Esq.  
THOMASON, HENDRIX, HARVEY,  
17 JOHNSON & MITCHELL, PLLC  
2900 One Commerce Square  
18 Memphis, TN 38103  
19 Gregory R. Hanthorn, Esq.  
James R. Johnson, Esq.  
20 JONES, DAY, REAVIS & POGUE  
3500 One Peachtree Center  
21 303 Peachtree Street  
Atlanta, GA 30308-3242

22  
23  
24  
5387

1 FOR THE DEFENDANT  
PHILIP MORRIS: Samuel E. Klein, Esq.  
2 DECHERT PRICE & RHOADS  
4000 Bell Atlantic Tower  
3 1717 Arch Street  
Philadelphia, PA 19103-2793

4  
5 David K. Hardy, Esq.  
SHOOK, HARDY & BACON  
1200 Main Street  
6 Kansas City, MO 64104  
7 Leo Bearman, Jr., Esq.  
BAKER, DONALSON, BEARMAN  
8 & CALDWELL  
165 Madison Avenue  
9 Suite 2000  
Memphis, TN 38103

10  
11 FOR THE DEFENDANT  
BROWN AND WILLIAMSON:

12 Lee J. Chase, III, Esq.  
GLANKLER BROWN, PLLC  
13 1700 One Commerce Square  
Memphis, TN 38103

14  
15 Charles S. Cassis, Esq.  
BROWN, TODD & HEYBURN, PLLC  
400 West Market Street  
16 32nd Floor  
Louisville, KY 40202-3363

17  
18 Gordon Smith, Esq.  
KING & SPALDING  
191 Peachtree Street  
19 Atlanta, GA 30303-17631  
20 COURT REPORTER: BARBARA BARRON, RPR  
Alpha Reporting Corporation

21  
22  
23  
24  
5388

1 (At 10:30 a.m., on the 18th day of  
2 March, 1999, Court met, pursuant to adjournment,  
3 when and where the following proceedings occurred,  
4 to wit:)

5 (Out of the presence of the jury.)  
6 THE COURT: All right. Mr. Bearman.

7 MR. BEARMAN: Well, I wanted to follow  
8 Your Honor's instructions and revisit the limited  
9 areas that Your Honor asked me to revisit.

10 THE COURT: All right.

11 MR. BEARMAN: Area number one --

12 MS. FLORENCE JOHNSON: Your Honor, if I  
13 could, just as a byway of brief announcements,  
14 apparently, Mr. Johnson has taken ill. I know that  
15 yesterday he was addressing the issue of a statute  
16 of repose as well as discussion on the dismissal of  
17 the McDaniel case. I wasn't here. I was in the  
18 meeting with the special master.

19 I could address the issue of the McDaniel  
20 situation, but I believe that, with Your Honor's  
21 indulgence, if we are going to discuss the statute  
22 of repose, if we could wait until Mr. Johnson -- he  
23 was leaving the minor medical emergency center when  
24 I talked to him this morning, and I believe he was  
5389

1 on his way to court.

2 With that as an introduction, I just  
3 wanted to mention that to the court before we  
4 started into arguments this morning.

5 MR. BEARMAN: If an attorney is ill, Your  
6 Honor, I certainly don't want to, you know, take  
7 advantage of that, or whatever Your Honor suggests.

8 THE COURT: Well, I think that the way to  
9 handle it is simply to take up whatever we have to  
10 take up besides the statute of repose just now and  
11 see where we are by the time we get through with  
12 that.

13 I think on the statute of repose  
14 question, it is simply a question of law yesterday  
15 that we had left off. So, obviously that needs to  
16 be resolved before we put the jury in the box for  
17 the presentation of the defendants' case. It may  
18 very well be that Mr. Johnson will be here by the  
19 time that we have gotten through with these others  
20 matters.

21 MR. BEARMAN: I will skip the statute of  
22 repose and go to the four matters that Your Honor  
23 said you wanted to revisit this morning.

24 THE COURT: All right.

5390

1 MR. BEARMAN: The first issue is in the  
2 McDaniel case. The question of failure to join  
3 indispensable parties. We have checked the  
4 record. Your Honor has not ruled on this issue.

5 We had filed it as a Motion in Limine  
6 back, I think, in November. The plaintiffs have  
7 done nothing to attempt to correct what is clearly,  
8 in my judgment, a position that cannot stand.

9 Your Honor asked us to deliver Williams  
10 versus Baxter to you. Is a federal court case  
11 which says simply this, among other things: It  
12 appears undisputed here in that upon his death  
13 Mr. Claude Earl Mason left no widow but was  
14 survived by three minor children, James Earl Mason,  
15 Crystal Dawn Mason and Jamie Lynn Mason.

16 Under the providing of T.C.A. 25, 106 A,  
17 25, 107, these children possess jointly any right  
18 of action against the remaining defendant herein  
19 for the wrongful death of their father. See

20 Jamison versus Memphis Transit Management, Sixth  
21 Circuit 381, Fed.2nd 670.

22 The two surviving children who are not  
23 represented herein are indispensable, and their  
24 joinder is required under 19 A Federal Rules of

5391  
1 Civil Procedure.

2 In this case, there are admittedly two  
3 sisters who have not joined. And our position is  
4 that under rule 19.01, they are indispensable  
5 parties, and their absence, frankly, exposes the  
6 defendants to additional liability, since everybody  
7 who is supposed to be here under T.C.A. 20-5-106  
8 isn't.

9 And they are -- and in the court's  
10 judgment, indispensable parties. And, as a result  
11 of that, the McDaniel case is flawed.

12 THE COURT: Well, you know, there is such  
13 a thing as *deja vu*. And maybe I considered this in  
14 my other life.

15 MR. BEARMAN: Well, Your Honor, we did  
16 raise this issue before Your Honor. And that is  
17 why you are having *deja vu*. And Your Honor said, I  
18 want to see this case that we cited. And we  
19 delivered that to Your Honor, and, then, there was  
20 not a ruling.

21 Then, Your Honor may recall, there was  
22 some more *deja vu*, and that is that we reminded  
23 Your Honor of this, as I recall it, at the  
24 beginning of the trial either while we were picking

5392  
1 the jury or perhaps before or just after, but I  
2 know it was mentioned.

3 But Your Honor has not ruled on the  
4 issue. So, that is why we feel that it must be  
5 raised.

6 THE COURT: Well, did I say anything?

7 MS. FLORENCE JOHNSON: You did, Your  
8 Honor. As I recall -- I am losing my voice to an  
9 extent. At the pretrial conference, we addressed  
10 this issue, and the defendants raised this with  
11 regard to Ms. McDaniel, and Your Honor discussed  
12 it.

13 And I don't have that transcript, but we  
14 can get the transcript, where Your Honor discussed  
15 whether or not Mr. Roberts, who is Ms. McDaniel's  
16 brother, and whether Theresa Greganti were  
17 indispensable parties. And my memory is, in the  
18 wrongful death, it is any beneficiaries.

19 THE COURT: Why don't I look at the  
20 transcript where we discussed that.

21 MR. BEARMAN: I don't know that I have  
22 it, but I will work at it very quickly. Well, I  
23 had the transcript yesterday of the summary  
24 judgment motion. I have a feeling I don't have it

5393  
1 today.

2 We will get it for Your Honor on that,  
3 and I will be glad to get it. Shall I go on and  
4 put that aside, or is Your Honor going to wait on  
5 it?

6 THE COURT: Well, I would like to see  
7 that, but let me just ask, pending that, let me,

8 nevertheless, ask Ms. Johnson what her response is  
9 to your statement on this matter.

10 MS. FLORENCE JOHNSON: My response, Your  
11 Honor, is a twofold responses. As I mentioned, we  
12 don't believe that under that statute these cases  
13 were brought, the siblings of Ms. McDaniel are  
14 necessarily indispensable parties.

15 If Your Honor were to find that these  
16 persons, Mr. Roberts and Ms. Greganti, were  
17 indispensable, Your Honor, we are prepared to give  
18 an affidavit to the court from these individuals  
19 saying they are not interested in being brought  
20 in. They don't want to be parties to this action.

21 Defendants have taken the deposition of  
22 Mr. Roberts and asked him that, and he indicated,  
23 as well, his sister's religious conviction that she  
24 doesn't want to be involved in lawsuits. She

5394

1 doesn't believe that is the way disputes should be  
2 revolved.

3 Barring that we can bring in affidavits,  
4 should the court find these are indispensable  
5 parties where the parties would agree to waive any  
6 interests they have to relay the fears of the  
7 defendants where the defendants would be somehow  
8 able to come in and file an action in the future  
9 should there be a resolution here.

10 THE COURT: Well, now, are you saying  
11 that you have an affidavit from each of these  
12 siblings, these two siblings?

13 MS. FLORENCE JOHNSON: I can have an  
14 affidavit, Your Honor. Mr. Roberts, unfortunately,  
15 has gone back to Lakeside, and we are going back  
16 there on tomorrow to get an affidavit from him, as  
17 well as Ms. Greganti, I can have it for the court  
18 tomorrow. I can have it on Monday.

19 I talked to Ms. McDaniel this morning and  
20 made her aware that this has become an issue, and  
21 we discussed getting affidavits, and her siblings  
22 don't have an objection to that.

23 THE COURT: So, the answer is you don't  
24 have the affidavit?

5395

1 MS. FLORENCE JOHNSON: I don't have it  
2 this morning, Your Honor.

3 THE COURT: Well, do you have any law  
4 that you can cite to the court that contradicts Mr.  
5 Bearman's assertion that these parties must be  
6 joined in order for the action to proceed on behalf  
7 of --

8 MS. FLORENCE JOHNSON: A Tennessee state  
9 court case, Your Honor. I don't have one available  
10 other than just to mention the dictates of the  
11 statute that indicate any beneficiary can bring the  
12 action on behalf of the estate.

13 And Mr. Bearman is citing, as I  
14 understand it, a federal court case that I don't  
15 necessarily think is the last word in this issue  
16 about who is indispensable and who is not.

17 THE COURT: Do you have any case from any  
18 other jurisdiction, either the state or federal,  
19 that contradicts Mr. Bearman's assertion as to  
20 what -- as to the necessity of including these

21 other siblings in the litigation?  
22 MS. FLORENCE JOHNSON: I do not, Your  
23 Honor.  
24 THE COURT: Let me see the case that Mr.  
5396

1 Bearman has.  
2 MR. BEARMAN: The Williams case?  
3 THE COURT: Baxter?  
4 MR. BEARMAN: Yes.  
5 THE COURT: Yes. What is the Tennessee  
6 rule? What is the cite on the Tennessee rule?  
7 MR. BEARMAN: You mean the indispensable  
8 party rule?  
9 THE COURT: Yes.  
10 MR. BEARMAN: 19.01.  
11 THE COURT: Now, what was this you said,,  
12 Ms. Johnson, about a deposition.  
13 MS. FLORENCE JOHNSON: In the deposition,  
14 the defendants took the deposition of the brother  
15 of Ms. McDaniel, Kenneth Robert. And it was  
16 discussed at the deposition about whether or not he  
17 was a party to the action.  
18 If you recall, Mr. Roberts has been hard  
19 to get in touch with. He has been in and out of  
20 rehabilitation clinics, and that is where he is  
21 today, as I understand it from Ms. McDaniel.  
22 During that deposition, it was discussed,  
23 it was asked of Mr. Roberts whether or not his  
24 sister, Theresa Greganti, wanted to be part of the  
5397

1 action, and he indicated, as McDaniel has  
2 indicated, that Ms. Greganti has a religious  
3 conviction against being a party to any sort of  
4 court case.  
5 In that respect, I would think that Ms.  
6 Greganti as well as Mr. Roberts, and they have  
7 indicated as such, has waived any interest in being  
8 parties, brought in as party plaintiffs to this  
9 case. The rule --  
10 THE COURT: Excuse me. Mr. Roberts, did  
11 I understand you to say that Mr. Roberts said in a  
12 deposition that he would not want to?  
13 MS. FLORENCE JOHNSON: I think in the  
14 deposition it was discussed with him about his  
15 sister's convictions with regard to being involved  
16 in this.  
17 THE COURT: I am talking about  
18 Mr. Roberts.  
19 MS. FLORENCE JOHNSON: I don't recall if  
20 defendants asked him, point blank, about his  
21 participation in the lawsuit and whether he was  
22 interested or not. I haven't seen the deposition  
23 transcript, Your Honor.  
24 THE COURT: What was this about the  
5398

1 affidavits? You said you have talked to  
2 Mr. Roberts?  
3 MS. FLORENCE JOHNSON: I have talked to  
4 Mr. Roberts, and he is willing to sign an affidavit  
5 saying that he does not want to be a party  
6 plaintiff to this case. And that is what I  
7 indicated I could bring back to the court.  
8 THE COURT: Excuse me. What about the

9 sister, Ms. Greganti, have you talked to her?  
10 MS. FLORENCE JOHNSON: Not this morning.  
11 Ms. McDaniel indicates to me that, based on her  
12 sister's convictions, she was going to discuss with  
13 her this morning getting an affidavit, and I can  
14 hopefully bring that back.

15 THE COURT: You have answered the  
16 question.

17 MS. FLORENCE JOHNSON: Thank you, Your  
18 Honor.

19 THE COURT: Now, what law do you cite,  
20 Mr. Bearman, that would preclude your client from  
21 being harmless pursuant to a judgment rendered in  
22 the suit filed by Ms. McDaniel without the two  
23 siblings?

24 MR. BEARMAN: The law I cited the court,  
5399

1 please, is the fact that, if all the people aren't  
2 joined and their rights adjudicated one way or the  
3 other, we are in jeopardy of being sued again.

4 THE COURT: I know you said that, but  
5 actually what law do you cite in support of that?

6 MR. BEARMAN: Well, rule 19.02(2)(i).

7 THE COURT: I read that. I read the  
8 whole rule. I am asking you, is there anything  
9 beyond that that you cite for that proposition?

10 MR. BEARMAN: Only the T.C.A. 20-5-106  
11 says who may be, not who may be, who are the proper  
12 parties to bring a lawsuit. I know this, if you  
13 don't get proper releases, if the court please, on  
14 death cases, you are subjecting your clients, it is  
15 certainly felt, to exposure from those statutory  
16 beneficiaries whose names are not on the release.

17 And, so, between 20-5-106 and rule 19 of  
18 the Tennessee Rules of Civil Procedure, it seems to  
19 me axiomatic that there is still exposure. Mr.  
20 Chase was at the deposition.

21 THE COURT: Excuse me a moment.

22 Well, here is what I am going to do.  
23 Really, I am looking at both 19.01 and 19.02. And  
24 I think that we have to consider both of these

5400  
1 rules and the thrust of them with regard to this  
2 type of a situation.

3 And, of course, the consideration,  
4 because 19.02 does contemplate that you can proceed  
5 without all of the siblings. But, now, it  
6 conditions that on by saying that: If a person as  
7 described hereof cannot be made a party. There is  
8 no showing, of course, that that has been met.

9 But, having said that, it does allow you  
10 to actually proceed if that condition can be met,  
11 that is, that they cannot be made a party.

12 And it then talks about the  
13 considerations as to how -- why you should be able  
14 to proceed with just one as opposed to all. And  
15 those are set forth in 19.02.

16 To what extent a judgment rendered in the  
17 person's absence might be prejudicial to the person  
18 or those already parties; the extent to which, by  
19 protective provisions in the judgment, by the  
20 shaping of relief, or other measures, the prejudice  
21 can be lessened or avoided; whether or not a



22 judgment rendered in the person's absence will be  
23 adequate; and whether or not the plaintiff will  
24 have an adequate remedy if the action is dismissed

5401

1 for nonjoinder.

2 When I consider all of those, given the  
3 aggressive and professional manner of the  
4 plaintiffs' prosecution of the claim on behalf of  
5 Ms. Bruch and the practical consideration of the  
6 expense and time were we to dismiss the Bruch  
7 complaint and send them back to the drawing board  
8 with a new lawsuit, including siblings, I think  
9 that it would be a violation to the spirit of  
10 19.02.

11 Nevertheless, we do have the condition of  
12 19.02 with the making of the party. In that  
13 respect, I am going to move back up to 19.01 and  
14 order that these two siblings be made involuntary  
15 plaintiffs and that the appropriate pleadings be  
16 entered to do so. Next matter.

17 MR. BEARMAN: The next matter, if the  
18 court please.

19 THE COURT: Excuse me just one second.

20 MR. BEARMAN: Sure.

21 THE COURT: Yes, sir.

22 MR. BEARMAN: Your Honor will recall  
23 yesterday that I argued that in the Karney case and  
24 in the McDaniel case, since Ms. McDaniel --

5402

1 Ms. Bruch, excuse me, did not smoke a Philip Morris  
2 cigarette until '78 and '79, and since Mr. Karney  
3 did not smoke a Philip Morris cigarette until 1980,  
4 all claims, both post '69 and pre '69 relating to  
5 failure to warn should be dismissed, or a directed  
6 verdict given, as to failure to warn claims in  
7 those two cases as they relate to Philip Morris,  
8 because, there was no smoking of the Philip Morris  
9 product prior to '69.

10 THE COURT: Let me just take -- let's  
11 just take one at a time, and let me see what we are  
12 talking about here, and let me make some notes.

13 MR. BEARMAN: Okay.

14 THE COURT: All right. First, we're  
15 talking about McDaniel. Is that the first one you  
16 mentioned?

17 MR. BEARMAN: You mean on the failure to  
18 warn? Or, are you talking about on the  
19 indispensable party?

20 THE COURT: You were talking about when  
21 they smoked the product.

22 MR. BEARMAN: Ms. Bruch smoked Benson and  
23 Hedges, which is a Philip Morris product, only in  
24 1978 and '79.

5403

1 THE COURT: Wait just a second.

2 All right. And then what did she smoke  
3 after '78 and '79.

4 MR. BEARMAN: She smoked both before and  
5 after and during those dates, the Viceroy, which is  
6 not a Philip Morris product. That is Brown and  
7 Williamson.

8 THE COURT: All right.

9 MR. BEARMAN: And my motion pertains to

10 Philip Morris and the failure to warn claims.  
11 Since they did not smoke Philip Morris cigarettes  
12 pre-July 1, 1969, there can't be any failure to  
13 warn about cigarettes that they haven't smoked.  
14 And, since the only cigarettes -- the  
15 only time they smoked Philip Morris cigarettes were  
16 after 1969, they are preempted.

17 Your Honor will recall, or at least my  
18 recollection is that, Mr. Johnson, I thought,  
19 conceded this point. But Your Honor's recollection  
20 will be the final point. I thought Mr. Johnson had  
21 acknowledged this point. This is just as to those  
22 aspects of the claims.

23 MR. HARVEY: I might point out, Your  
24 Honor, in the Newcomb case, that we have the same

5404

1 argument, since according to Mr. Newcomb's  
2 testimony he began smoking a Reynolds product --

3 THE COURT: Okay. And I will give you  
4 time to address that, General, in just a couple of  
5 minutes. So, please come back to it.

6 MR. HARVEY: I thought while Your Honor  
7 was on it, I thought I would say we are on this as  
8 well.

9 THE COURT: All right. Well, let me ask  
10 you this, Mr. Bearman, where is my case I asked you  
11 for yesterday on this conspiracy concept.

12 MR. BEARMAN: Well, that had to do with  
13 the statute of repose, and I held back on that  
14 because Mr. Johnson wasn't here. I will certainly  
15 go forward. But the case that I am going to  
16 present to Your Honor, while I candidly state is  
17 not directly on point is, I think, close enough to  
18 merit Your Honor's careful attention.

19 THE COURT: Why don't you pass it forward  
20 and let me take a look at it.

21 MR. BEARMAN: This is Phillips against  
22 Reynolds Industries, R.J. Reynolds. This is a  
23 tobacco case out of the eastern section of  
24 Tennessee in which there were allegations, among

5405

1 other things, of conspiracy.

2 And the court dismissed the complaint in  
3 response to a motion to dismiss and/or summary  
4 judgment citing -- stating this. It can be seen  
5 from the foregoing that the ten-year statute of  
6 repose would bar any cause of action accruing prior  
7 to January 1, 1966, the effective date of the  
8 federal act.

9 Now, I tell Your Honor this is not  
10 directly on point, because the court goes on to  
11 discuss the preemption issue, but the court stated  
12 that a cause of action which sounds, among other  
13 things, in conspiracy, goes down before the 10 year  
14 statute of repose under the Tennessee Product  
15 Liability Act because it is a product liability  
16 case, although, as I point out, it goes off  
17 specifically on the preemption issue.

18 It is a pre-Cipollone case, and I cite it  
19 to Your Honor because I think that the court's  
20 argument is close to what I argued yesterday on the  
21 statute of repose, and that is, because this is a  
22 product liability case as to Ms. Bruch, Ms. Bruch's

23 claims against Philip Morris, since she only  
24 smoked -- she smoked them in '78 and '79, more than

5406

1 10 years before she filed the suit, in any event,  
2 including any cause of action including conspiracy  
3 would go down.

4 THE COURT: Well, all right. Mr. Chase.

5 MR. CHASE: If Your Honor, please, I hope  
6 to contribute on the issue that you have presently  
7 before you. We also found in the federal system a  
8 Tennessee case that went up from a district court  
9 and was affirmed on appeal, Spencer versus Miles  
10 Laboratories. And I have given Your Honor the  
11 citation at 810 Federal Supplement 952.

12 And the way to examine what Mr. Bearman  
13 is raising and has pointed out by this district  
14 court opinion, that you look at the plaintiffs'  
15 theories of recovery, whether they be negligence or  
16 strict liability in tort.

17 And, when they involve a product, as they  
18 do in the instant cases before you, they, then,  
19 come under the statute of repose, all claims. And  
20 the distinction between negligence and a product  
21 liability claim under the Spencer versus Miles  
22 Laboratory tells you --

23 THE COURT: Let me just, before we get  
24 too far into that, and we will come back to that,

5407

1 but I would assume that the argument here that Mr.  
2 Bearman advances is that the failure to warn claims  
3 should be barred as to all of the defendants? Just  
4 have a seat for a minute and let me see if I  
5 understand what Mr. Bearman is saying.

6 MR. BEARMAN: Yes. Provided that the  
7 smoking history fits, exactly. I mean, I can't --  
8 if there is, there is no pre-1969 failure to warn  
9 claim as to those two plaintiffs with regard to my  
10 client's cigarettes because they didn't --

11 THE COURT: I know what your argument is  
12 there in terms of -- but I am talking about even if  
13 they used it, I am trying to understand this  
14 sentence here in this opinion, frankly, which is  
15 without explanation. It is just in here.

16 MR. BEARMAN: That would be my position.

17 THE COURT: What?

18 MR. BEARMAN: That would be my position,  
19 generally, for all.

20 THE COURT: It says -- it sounds to me  
21 that what Judge Goddard is saying on the face of it  
22 would be that whether they smoked the product or  
23 not, that since it wasn't brought within 10 years,  
24 that it would be barred by the statute of repose as

5408

1 far as the failure to warn. Now, I don't know.

2 MR. BEARMAN: That is the way I read what  
3 he has said there. That is pre-Cipollone.

4 THE COURT: What was Cipollone?

5 MR. BEARMAN: Cipollone is the major  
6 preemption case.

7 THE COURT: All right. Ms. Johnson.

8 MS. FLORENCE JOHNSON: I think, Your  
9 Honor, the defendants are right in respect to one  
10 thing. I think we have acknowledged that there is

11 not a failure to warn claim post 1969.

12 Whether or not that Phillips case, which  
13 I don't have the benefit of looking through, speaks  
14 to this issue of whether the statute of repose is a  
15 bar for fraud and negligence and strict liability  
16 claims, I don't believe that that is necessarily  
17 the case.

18 What they are attempting to do, I  
19 believe, is put the focus in this on a product, the  
20 product being the cigarette. And it is interesting  
21 that that Phillips case is a pre-Cipollone case  
22 because Cipollone said specifically that state law  
23 claims, conspiracy claims, were not waived.

24 But the focus is not in our contentions

5409

1 on the product, the cigarette, necessarily, itself;  
2 it is the actions of all of the defendants together  
3 in creating the conspiracy.

4 We could have just as easily, as in some  
5 other cases where co-conspirators who didn't make  
6 cigarettes have been sued and left for conspiracy  
7 claims. The Tobacco Institute has been sued and  
8 Hill and Knowlton has been sued.

9 So, I don't think the focus should be on  
10 whether it is a product and these defendants are  
11 making the product. I think the focus really goes  
12 to whether or not the conspiracy --

13 THE COURT: Well, then, what you are  
14 saying is you can hold them liable whether or not  
15 cigarettes were unreasonably dangerous or not?

16 MS. FLORENCE JOHNSON: I think in our  
17 situation you have to have one or the other. It  
18 has to be an unreasonably dangerous situation, or,  
19 I am not remembering the wording that you said.

20 But, in terms of product liability, they  
21 have to be found liable under that statute in order  
22 to really get toward conspiracy if we're talking  
23 about these manufacturers.

24 But, when I spoke to others that don't

5410

1 fall into the products liability statute who could  
2 be held as conspirators, Tobacco Institute and Hill  
3 and Knowlton. So, I don't believe in that  
4 respect --

5 THE COURT: Well, let me try to keep this  
6 focused since you seem to have moved directly into  
7 the point that Mr. Bearman is arguing and that Mr.  
8 Chase has raised by saying that, even if there is  
9 not a liability for product, the defendants can be  
10 liable in conspiracy.

11 So, I presume, therefore, that if  
12 cigarettes were as safe as peppermint candy, you  
13 would still be able to hold these defendants  
14 liability for conspiracy independent of the product  
15 itself, it seems like what you are saying.

16 MS. FLORENCE JOHNSON: Well, I believe  
17 that that analogy somewhat simplifies it. But, I  
18 think, yes, if you boil it down to that essence, I  
19 think the conspiracy remains regardless of the  
20 safety issues necessarily of the product. We don't  
21 have that situation.

22 THE COURT: All right. I just wanted to  
23 be clear about your position. All right. Then,

24 that takes us, I guess, to where Mr. Chase was in  
5411

1 terms of his position in which he cited the case,  
2 is that correct?

3 MR. CHASE: That's correct.

4 THE COURT: So, just have a seat for a  
5 minute and let me look at what Mr. Chase is talking  
6 about.

7 By the way, Ms. Johnson, do you have any  
8 case authority where there has been that type of  
9 bifurcation of the liability features?

10 MS. FLORENCE JOHNSON: I don't, Your  
11 Honor. I believe Mr. Johnson did some research on  
12 that, but I don't have the benefit of his research,  
13 Your Honor. I don't have the case.

14 THE COURT: On this matter that I am  
15 looking at, Mr. Wilner, is cited as 810 Federal  
16 Supplement 952.

17 MR. CHASE: I have a copy for Mr. Wilner.

18 MR. BEARMAN: I think he is looking for  
19 the cite on the Phillips case. I don't have a copy  
20 of that.

21 THE COURT: I am looking at Spencer  
22 versus Miles Laboratory.

23 THE COURT: Well, it looks like, with  
24 respect to your argument there, Ms. Johnson 29, 28,  
5412

1 10, 26 brings in the concept of failure to warn  
2 whether negligent or innocent, misrepresentation,  
3 concealment or nondisclosure. So, I don't  
4 understand how you could separate that out and say  
5 that it wouldn't apply under the products liability  
6 statute.

7 MS. FLORENCE JOHNSON: Your Honor, I  
8 think, looking at 29, 28, 10, 26, if you would  
9 allow Mr. Wilner to address this point briefly.

10 THE COURT: All right.

11 MR. WILNER: Your Honor, the confusion  
12 here arises with the definition of what product  
13 we're talking about. Let me explain.

14 For instance, if, let's say we had a  
15 product use of brand A in the 1950's, which -- for  
16 which use, let's assume, the statute of repose had  
17 run, just for purposes of argument.

18 Then, we have another product use in the  
19 1980's or 90's for which use the statute of repose  
20 has not run. Let's just assume that to be the  
21 case.

22 Now, let's say we sue -- to make this  
23 argument, let me further assume that we sue  
24 somebody who is not even a manufacturer, the  
5413

1 Tobacco Institute or Hill and Knowlton, and Hill  
2 and Knowlton -- for conspiracy.

3 Hill and Knowlton comes in and says, oh,  
4 but, the statute ran on the first product. And we  
5 say, well, so what. Yes, there might have been  
6 other products, but we're entitled to sue you under  
7 the second product for conspiracy, and you didn't  
8 make either product.

9 So, you don't have a claim that you could  
10 be sued under one and not the other. You are not  
11 even a manufacturer. The time has not run as to

12 the second product and for the cause of action that  
13 surround the second product.

14 So, in our case Philip Morris stands in  
15 the shoes of the known manufacturer with respect to  
16 the second product, in other words, true, that  
17 certain claims may or may not have run as to the  
18 first product. But, as to the second product,  
19 Philip Morris is no different from a  
20 non-manufacturer who was sued for --

21 THE COURT: Well, but the problem I have  
22 got with that is that by 1966, you can't have a  
23 claim arising for failure to warn. So --

24 MR. WILNER: Well, '69 or '70, but.

5414

1 THE COURT: I don't know whether it is  
2 '66. That is what they said on this federal  
3 opinion or this eastern district opinion.

4 MR. WILNER: Right. But, our claim is  
5 for conspiracy, not failure to warn, which is  
6 specifically reserved under Cipollone to today. So  
7 that our claim against Philip Morris does not rest  
8 on failure to warn but goes to conspiracy as to the  
9 second product.

10 THE COURT: Maybe I ought to take a look  
11 at Cipollone. Mr. Chase, you were going to say  
12 something.

13 MR. CHASE: Your Honor, I was going to  
14 comment that you read a part of the statute in  
15 regard to product liabilities actions. I am  
16 somewhat surprised to hear the claim that this  
17 isn't a products liability action. I must have  
18 missed something over the past three months.

19 The legislature covered the point on the  
20 duty to warn conspiracy and everything. They  
21 rolled it into the last line of the legislation,  
22 which says: After denominating all the various  
23 theories of recovery, including concealment,  
24 nondisclosure, so on, under any other substantive

5415

1 legal theory in tort or in contract whatsoever.

2 THE COURT: Well, I know. But let me ask  
3 you this, now. Mr. Wilner has thrown into the mix,  
4 now, the concept that Cipollone preserves the right  
5 of action on conspiracy and fraud, presumably with  
6 respect to the failure to warn.

7 Now, I remember when we talked about  
8 this, we did leave some claims open with regard to  
9 conspiracy and fraud, but not as they related to  
10 the failure to warn, but really as they related to  
11 some affirmative misrepresentation, I think.

12 Now, I don't remember whether that was  
13 because in an attempt to interpret Cipollone or  
14 not.

15 MR. CHASE: I could only tell you my  
16 recollection of that. Mr. Hardy is probably,  
17 frankly, a better person to speak to Cipollone. He  
18 was our spokesperson in that regard. The carving  
19 out you did was for affirmative representation  
20 which was false. That is the way I recall it.

21 MR. HARDY: I left the court's order back  
22 at our office this morning. But the court's order,  
23 I can represent, does say that failure to warn  
24 claims are preempted and that other representations

5416

1 are preempted except to the extent they are  
2 misrepresentations or representations made with the  
3 knowledge that they might lead to affirmative  
4 misrepresentations.

5 And the example the court used with me  
6 when I was arguing it at the hearing back in  
7 November or December was, supposing you did a study  
8 and you had one result indicating something to do  
9 with 50 people and another one on 25, and all you  
10 did was talk about the 50, and you left out the 25  
11 in your report. And I --

12 THE COURT: I will grant the motion as it  
13 relates to the failure to warn claims under the  
14 statute of repose, I believe as to all of these  
15 defendants, because I just don't see how you can --  
16 I mean, I think that the failure to warn claims is  
17 contemplated within the scope of the products  
18 liability statute.

19 And, as such, the statute of repose would  
20 come into play, I think, and preempt those claims.  
21 And, certainly any claims since the legislation  
22 would also be preempted by the legislation.

23 All right.

24 MR. BEARMAN: Your Honor, if Your Honor

5417

1 will allow me, I am wrapping up those that Your  
2 Honor --

3 THE COURT: Pass this back to Mr. Chase  
4 please.

5 MR. BEARMAN: If Your Honor please, one  
6 that Your Honor wanted to revisit today was the  
7 causation issue on Mr. Karney.

8 I read, Your Honor, from the testimony of  
9 Mr. Mauer who was the only causation expert put on  
10 by plaintiffs. Let me put Your Honor in context.  
11 You remember that Mr. Karney smoked Philip Morris  
12 from 1980 until '96. But from '43 to '80, he  
13 smoked Pall Mall manufactured by another company,  
14 but not made a party to the action. Can I proceed,  
15 or is Your Honor checking notes?

16 THE COURT: No. I am listening to you.

17 MR. BEARMAN: Dr. Mauer gave the  
18 following testimony.

19 "QUESTION: Can you tell us from a  
20 reasonable degree of medical certainty that  
21 Mr. Karney's 37 years of smoking a cigarette other  
22 than a cigarette manufactured by Philip Morris  
23 would not have caused --

24 THE COURT: Let me understand now, what

5418

1 is this motion again, now?

2 MR. BEARMAN: This is a motion for a  
3 directed verdict on Karney on the grounds of lack  
4 of causation between the smoking of Philip Morris  
5 Marlboros and Mr. Karney's death based on Dr.  
6 Mauer's concessions.

7 THE COURT: I am sorry. You will have to  
8 kind of help me remember what we were talking about  
9 here.

10 MR. BEARMAN: I will be glad to. The  
11 issue is whether there is proof in the record that  
12 could go to the jury as to whether or not there has

13 been a causal connection made between the smoking  
14 of Marlboros by Mr. Karney from 1980 to '96 and his  
15 death to a reasonable degree of medical certainty,  
16 which is required as the standard, in view of the  
17 fact that Dr. Mauer pointed out, first, that he  
18 could not say that smoking the other brand for some  
19 37 years would not have caused the cancer, and, his  
20 further concession that there is a 20 to 25 year  
21 latency period before the cancer manifests -- comes  
22 out or becomes cancer as I understand his  
23 statement.

24 And, therefore, on both of those bases,  
5419

1 since he conceded that the '43 to '80 smoking by a  
2 cigarette other than that manufactured by Philip  
3 Morris, he could not say would not have caused the  
4 cancer.

5 And, since there is a 25-year latency  
6 period which would have carried Mr. Karney's cancer  
7 from Philip Morris to the year 2000, and he died --  
8 or 2005, and he died well prior to that, there is  
9 no basis on which Your Honor could submit to the  
10 jury a causation connection between smoking  
11 Marlboro and Mr. Karney's death under the statute  
12 required by Tennessee, namely a reasonable degree  
13 of medical certainty.

14 THE COURT: I am going to deny that  
15 motion. I think that is a matter for the jury in  
16 terms of their facts of determination of causation.

17 MR. BEARMAN: One final point, except for  
18 my general statute of repose issue which Your Honor  
19 asked me to wait on.

20 On Ms. Bruch, the testimony is as  
21 follows. My position on Ms. Bruch is almost the  
22 obverse, but it seems to me stronger with regard to  
23 Philip Morris products.

24 Your Honor will recall that in Ms. Bruch,  
5420

1 she smoked from about ninety forty -- let me get  
2 that exactly correct. From '49 to 1990. She  
3 smoked Viceroy's, not a Philip Morris product.

4 From '78 to '79 -- she smoked them at the  
5 rate of about a pack a day, a pack a day, maybe  
6 about a pack and a half a day is the testimony.

7 In 1978 and 1979 while she did not cease  
8 smoking Viceroy's, she did smoke Benson and Hedges,  
9 but only at the rate of two packs a week. Two  
10 packs a week.

11 Now, Dr. Mauer was asked this question.

12 "QUESTION: I want to go to the second  
13 category, exposures in a dose sufficient to cause  
14 disease. Doctor, again, in regard to the factual  
15 information on each one of these boxes," -- Your  
16 Honor will recall he was referring to that exhibit  
17 which was clearly incorrect under the facts, but he  
18 was referring to it nonetheless.

19 "QUESTION: Do you believe that exposure  
20 to cigarette smoke is enough to cause disease in  
21 each one of these individuals?"

22 And he said this very important  
23 statement.

24 "ANSWER: Correct. We really don't know  
5421



1 what the lower limit of cigarette exposure is  
2 without any risk whatsoever of developing lung  
3 cancer, but certainly this exposure is up where we  
4 fully recognize cigarette smoke as the cause of  
5 lung cancer."

6 Now, this exposure to which he referred  
7 is a pack per day every year from '49 to '90. But,  
8 my client's cigarettes were not smoked a pack a day  
9 every year from '49 to '90. My client's cigarettes  
10 were smoked two packs a week from '78 and '79.

11 THE COURT: I think that is a fact matter  
12 in terms of causation to be determined by the  
13 jury. I think that there is sufficient evidence as  
14 far as establishing a prima facie case that the  
15 jury can reasonably apportion causation as it  
16 relates to Philip Morris to the other defendants.  
17 I deny the motion.

18 MR. BEARMAN: Other than to make a point  
19 on the 10 year statute of repose, which Your Honor  
20 asked me to wait on, that concludes the issues that  
21 Your Honor asked me to delay until this morning.

22 THE COURT: All right. Okay. We still  
23 now have to deal with the statute of repose  
24 question, and I think it boiled down to six years.

5422

1 And the date of injury in the death of Mr. Settle  
2 is more than six years before the filing of the  
3 lawsuit. Mr. Chase.

4 MR. CHASE: We also have, Your Honor, in  
5 the McDaniel matter, the six year issue in regard  
6 to Ms. Bruch. And that is, and you will recall  
7 under the statute of repose her diagnosis with lung  
8 cancer in 1990.

9 And on yesterday evening I told Your  
10 Honor we would check the transcripts about Dr.  
11 Mauer's testimony in terms of was this two  
12 different cancers or one in the same, and the  
13 micrometastasis, which I have done, I think  
14 properly would have to await Mr. Johnson's arrival.

15 THE COURT: I thought I ruled on that  
16 yesterday, but I might have been tentative in my  
17 discussion of it.

18 MR. CHASE: I have gotten both the direct  
19 and cross-examination of Dr. Mauer from the  
20 transcript, which is the litmus test, as it were,  
21 on which the thing ought to be considered.

22 THE COURT: But I thought I ruled,  
23 nevertheless. In other words, I know you talked  
24 about what Mr. Mauer said, but I thought I ruled

5423

1 on, based my concept of the six year limitation, I  
2 discussed that yesterday, although we had talked  
3 about looking at Dr. Mauer's actual testimony. You  
4 are correct in that respect.

5 But I was basically taking the position  
6 that, even assuming that Dr. Mauer connects the  
7 1990 cancer with the 1994, I think it was cancer of  
8 the lung in '90 and cancer of the breast in '94, or  
9 of the knee, or something like that.

10 MR. CHASE: The sacrum.

11 THE COURT: And he had said they were  
12 both adenocarcinoma, and then plaintiffs had said  
13 something about micrometastasis. And I guess what

14 I am saying is that, even if Dr. Mauer says that  
15 the 1994 was a recurrence of 1990, that I was  
16 denying the motion as it relates to the statute of  
17 repose. And I gave the reasons for that yesterday.

18 MR. CHASE: I apologize. I did not  
19 understand it that way.

20 THE COURT: That is quite all right. We  
21 were dealing with a lot of issues. And, so, but if  
22 I didn't say it yesterday, I am simply saying it  
23 this morning.

24 MR. CHASE: I sure wish I could read Dr.  
5424

1 Mauer to you today.

2 THE COURT: Well, I am accepting what you  
3 are saying Dr. Mauer is going to say.

4 MR. CHASE: He is so much more articulate  
5 in his testimony than I am.

6 THE COURT: You can go ahead and read it.

7 MR. CHASE: It is on the direct of Mr.  
8 Johnson.

9 "QUESTION: Based upon your review of  
10 the medical records, did she ever become diagnosed  
11 with lung cancer any additional time after 1990?

12 "ANSWER: Well, they made a decision  
13 again, because this lung cancer was resected, and  
14 we really have no evidence that giving chemotherapy  
15 to someone who has no evident lung cancer is  
16 successful. Now, that is not true for all cancers,  
17 but it happens to be for lung cancer.

18 And, so, they decided not to give her any  
19 further therapy. And she came back in 1994, and,  
20 at this time, had a bone metastasis, so that she  
21 did have further growth of this lung cancer."

22 On cross-examination, Mr. Smith asked the  
23 following questions, again, of Dr. Mauer.

24 "QUESTION: Do you think that the  
5425

1 doctors didn't get all of the lung cancer in 1990  
2 and some cancer remained in the lung and  
3 subsequently spread to the sacrum?

4 "ANSWER: No, sir. The lung cancer was  
5 gone. However, at the time the lung cancer was  
6 found, there was what we call micrometastasis.  
7 That is tumor so small at that time that it  
8 couldn't be seen. If you recall, we talked about  
9 small cell lung cancer, the paper I wrote.

10 "QUESTION: But this isn't small cell  
11 lung cancer?

12 "ANSWER: No, but it is an example where  
13 you can't find it on inspection, but you can find  
14 it when you grow the tumor in culture.

15 "QUESTION: I just want to get clear  
16 what you are saying. You are saying that they got  
17 all the cancer in the lung, but, before they did  
18 that surgery, some micro piece of cancer had  
19 already spread to somewhere else?

20 "ANSWER: Correct.

21 "QUESTION: And, Doctor, you are telling  
22 this jury that the cancer had already spread, that  
23 this is lung cancer to another part of the body?

24 "ANSWER: Correct.  
5426

1 And, so, the point being of that whole

2 discussion was, under our law --  
3 THE COURT: But I understand that. And  
4 the only thing I will say in addition to what I  
5 said yesterday on it, would be that she got lung  
6 cancer from smoking, that is the argument of the  
7 plaintiffs. The lung cancer was resolved, but, in  
8 the meantime, a part of it had escaped and created  
9 a new cancer four years hence.

10 So, I would simply, again, use the same  
11 analysis that I did yesterday, and I think, too,  
12 that you have to determine whether or not in the  
13 concept of injury under the statute of repose, the  
14 new cancer represented a new injury. And, in my  
15 mind there is some -- there would be some  
16 considerable argument in that favor, although I  
17 don't think I have to reach that.

18 I think I can stand on the basis of my  
19 analysis in ruling that I would deny the statute of  
20 repose application that I stated yesterday.

21 MR. CHASE: Thank you.

22 MR. HARVEY: Your Honor, there is one  
23 additional motion that we had that I mentioned to  
24 the court yesterday. We consider it a significant

5427  
1 motion, because it deals with conspiracy as to Mr.  
2 Newcomb --

3 THE COURT: Let's take a 10-minute break,  
4 and then we will come back and take that.

5 (Whereupon, a brief recess was taken in  
6 the proceedings.)

7 THE COURT: Mr. Harvey.

8 MR. HARVEY: Your Honor, please, we have  
9 a motion for directed verdict on the basis that  
10 there is no evidence which has been put forward in  
11 the record to support submitting to the jury in the  
12 Newcomb case the issue of conspiracy.

13 I will submit, Your Honor, that -- and  
14 the basis of it is that in order for there to be a  
15 conspiracy, there has to be some fraud or  
16 misrepresentation. And, if there is fraud or  
17 misrepresentation, there has to be some reliance by  
18 someone on that fraud or misrepresentation.

19 In the Newcomb claim it is clear there is  
20 no reliance, or was no reliance, on the part of Mr.  
21 Newcomb to anything which has now been alleged as  
22 the basis of some kind of conspiracy.

23 The court may recall that Mr. Newcomb  
24 testified about how he began smoking in 1942, or

5428  
1 1942 or 1943. But, as to the R.J. Reynolds, when  
2 we get to Newcomb, when he begins smoking the R.J.  
3 Reynolds product in the early 70's, Mr. Newcomb  
4 clearly says in his testimony that he was already,  
5 in his words, I was already addicted and did not  
6 have the capability to stop even if I wanted to, so  
7 that these things really didn't make any difference  
8 to me.

9 He couldn't remember any information that  
10 was contained in any Winston cigarette  
11 advertisement that he had seen. Although he had  
12 seen the Frank Statement, he testified that he  
13 didn't rely on it in any particular way, or in any  
14 way.

15           That, based on his commitment at that  
16 point and the allegations which he has made, that  
17 he was already addicted, and there wasn't anything  
18 that he could do anyway. And he testified about --  
19 I mean, we have gone through all of the awareness  
20 testimony of Mr. Newcomb, and I covered that the  
21 other day.

22           But I think it is sufficient to say that  
23 there was absolutely no reliance by Mr. Newcomb on  
24 any fraud or misrepresentations or allegations of

5429

1 fraud or misrepresentations that have been alleged  
2 in the case.

3           And, for that reason, there is no  
4 evidence from which the jury could find any harm  
5 coming to Mr. Newcomb as a result of any acts on  
6 the part of the R.J. Reynolds company.

7           THE COURT: Well, what if he were a  
8 co-conspirator with -- I mean, what if R.J.  
9 Reynolds was a co-conspirator with the product  
10 manufacturer that he was smoking before he became  
11 addicted in terms of fraud and misrepresentation?

12           MR. HARVEY: Well, I can carry it all the  
13 way back to the time that he first started smoking,  
14 and he said he first started smoking because --  
15 well, in his testimony, he said he wasn't told  
16 anything by the tobacco companies, and he said he  
17 first started smoking because he wanted to look big  
18 and grown-up. As he said in his words, I wanted to  
19 look cool.

20           So, that was in 1943. And, by 1953,  
21 which would have been -- or '54, which would have  
22 been 10 or 15 years later, Mr. Newcomb is now into  
23 his 20's, and he is, in his words, I was already  
24 hooked by that time, and I just didn't pay

5430

1 attention because I was not able to quit.

2           So, Mr. Newcomb -- in Mr. Newcomb's  
3 situation, as he has put on his evidence, there is  
4 no reliance.

5           THE COURT: Well, now, I am trying to  
6 understand -- I guess my question is also pegged on  
7 the date question. That is to say, is your answer  
8 that even before he started smoking Winston's, that  
9 there was no reliance on the fraud and  
10 misrepresentation? Is that your answer to my  
11 question?

12           MR. HARVEY: That is correct, Your  
13 Honor. If you take 1954, which is where the  
14 plaintiffs seem to be pegging their dates to the  
15 Frank Statement and others, Mr. Newcomb, by this  
16 time, is 21 years old. He is in the Army, fully  
17 emancipated. He has been smoking for some 10  
18 years. In his words, I was already --

19           THE COURT: I am going to let that  
20 question go to the jury as to whether or not they  
21 believe that there was reliance, if, in fact, they  
22 find fraud and misrepresentation and conspiracy,  
23 whether they believe that there was reliance on it,  
24 as opposed to this man, by that time, being so far

5431

1 gone that there was no reliance. I think that  
2 ought to be a question to go to the jury. Mr.

3 Chase.

4 MR. CHASE: Your Honor, in light of your  
5 statement to me this morning on the statute of  
6 repose, I think, on behalf of Brown and Williamson,  
7 we would like to renew our motion on the statute of  
8 limitations in regard to Ms. Bruch in the McDaniel  
9 case.

10 And the reason is, if Your Honor is  
11 considering this as two separate, one in 1990 and  
12 one in 1994, events, Ms. Bruch did not file her  
13 lawsuit until October the 21st, 1997. And,  
14 therefore, she is outside the one year statute of  
15 limitations within the times, A, that she could  
16 have filed after the 1990 diagnosis.

17 And she certainly was aware, A, that she  
18 had cancer, and, B, that she had a major surgical  
19 procedure when they resected the lung. So, she had  
20 a year in which to file that claim which Ms. Bruch,  
21 then alive, did not do.

22 And the same is equally true in 1994.  
23 More compelling, the only testimony in this record  
24 in 1994 is that when that diagnosis occurred,

5432  
1 according to Ms. McDaniel, if I recall correctly,  
2 she knew she was going to die and that they could  
3 do nothing for her at that point in time. So, she  
4 had one year from that time, 1994, in which to file  
5 her lawsuit, which she did not do.

6 So, even if you consider that these were  
7 two separate cancers, as it were, each one of them  
8 is time barred under the statute of limitations,  
9 being one year.

10 THE COURT: First, I did not predicate my  
11 ruling on the statute of repose on the conclusion  
12 that there were two injuries, although I did say  
13 that there is substantial thought that should be  
14 given to that in the context testimony of Dr.  
15 Mauer, but I really predicate my ruling on my  
16 discussion yesterday, which was assuming even if  
17 there were one continuance metastatic process.

18 But, secondly, with regard to the statute  
19 of limitations, I have discussed the considerations  
20 that I think are sufficient in my mind as it  
21 relates to the applicability of the statute and the  
22 factors to be applied, that I believe it is  
23 something that the jury should consider based upon  
24 the proof presented.

5433  
1 And I believe that I have generally  
2 stated the standard that I think the jury should  
3 apply in deciding that. So, I will deny the  
4 statute of limitations motion.

5 MR. CHASE: Thank you, Your Honor.

6 THE COURT: All right. Are we ready for  
7 the jury?

8 MR. BEARMAN: I need to raise one point.  
9 Mr. Johnson is not here. Can I just raise the  
10 point?

11 THE COURT: That is right. We still have  
12 to -- go ahead.

13 MR. BEARMAN: Yesterday, I contended to  
14 Your Honor that Ms. Bruch's case against Philip  
15 Morris, since she only smoked the product in '78

16 and '79, that it was a products liability case and  
17 that she was barred by the 10 year statute of  
18 repose.

19 Your Honor asked and took the position  
20 that, what if there is a conspiracy under which  
21 Philip Morris has conspired to get Ms. Bruch to  
22 smoke Brown and Williamson's cigarettes, wouldn't  
23 that not call into attention, because it is a  
24 conspiracy argument, the statute of repose.

5434

1 This is a product liability case, and I  
2 think under Phillips, as I have submitted to Your  
3 Honor, I think the answer is the 10 year statute of  
4 repose.

5 THE COURT: I didn't look at the Phillips  
6 case. I looked at the others. If you want me to  
7 look at that, I will look at that now.

8 MR. BEARMAN: I understand. That has to  
9 do with the language that I pointed out to Your  
10 Honor that the argument --

11 THE COURT: This is the case, okay. I am  
12 sorry. I did look at that.

13 MR. BEARMAN: You did look at that. So,  
14 my position is going to be -- excuse me.

15 THE COURT: Go ahead. I am listening.

16 MR. BEARMAN: My position before Your  
17 Honor is going to be simply this. While each one  
18 of these complaints says jurisdiction is authorized  
19 pursuant to the Tennessee Product Liability Act,  
20 29, 28, 101 et seq., and that this is clearly a  
21 product liability case, and that, therefore,  
22 because it is all actions, no matter how you couch  
23 it, are product liability actions.

24 THE COURT: But that begs the question.

5435

1 MR. BEARMAN: I understand Your Honor's  
2 position.

3 MR. BEARMAN: So, my request is going to  
4 be this. If Your Honor says that conspiracy is  
5 going -- is not going to be barred by the 10-year  
6 statute, then it seems to me that I am absolutely  
7 entitled to a motion for a directed verdict that  
8 any assertion that my client's product, Benson and  
9 Hedges, caused Ms. Bruch's injury and death, that  
10 is what I think the real product case is here, that  
11 is surely barred by the 10-year statute.

12 In other words, if Your Honor holds me in  
13 in conspiracy, I am not going to re-argue that.  
14 But, surely, the 10-year statute bars any assertion  
15 that my client's product caused, and there is  
16 certainly a major assertion to that affect.

17 So, I urge Your Honor to grant me a  
18 directed verdict on the product aspect of the  
19 statute of repose.

20 THE COURT: Well, I certainly don't mind  
21 giving the jury a charge -- I haven't heard from  
22 Ms. Johnson or the plaintiffs' side on this  
23 question. But I don't have any problem giving the  
24 jury a charge that they cannot hold Philip Morris

5436

1 liable of any injury arising from the use of your  
2 product based upon the time period for which that  
3 claim could have been brought.

4 MR. BEARMAN: I hear Your Honor. But,  
5 what I would urge, since Your Honor is saying that,  
6 which I believe to be clearly true, I think I am  
7 entitled to a directed verdict on that issue.

8 THE COURT: Well, I guess the question is  
9 how narrow do I deal with the issue of directed  
10 verdicts. And, to me, that is a discretionary  
11 matter at that juncture.

12 And the reason I say that is because I  
13 think it would tend to confuse the issues and the  
14 analysis to the jury for me to direct a verdict as  
15 to Philip Morris with regard to its cigarette.

16 And I don't really know and have not  
17 analyzed it in terms of how I could come along and  
18 perhaps direct verdicts in some piecemeal fashion  
19 as to many of the other parties and issues in the  
20 lawsuit. I think I can do that and should do that  
21 where I think, in doing so, it would not confuse or  
22 complicate the analysis and evaluation of the  
23 proof.

24 But I think that the same objective in  
5437

1 law can be accomplished by the instruction that I  
2 have mentioned.

3 MR. BEARMAN: Well, I could prepare, I  
4 think, a very clear and lucid order for Your Honor  
5 if you choose, if Your Honor chooses not to take  
6 the approach of directed verdict, and I would  
7 remind Your Honor at the end of the case.

8 THE COURT: I guess I am saying, if you  
9 want to prepare an order, I don't have any problem  
10 with that. But, simply trying to explain that to  
11 the jury, I think it needs to be dealt with as a  
12 charge.

13 MR. BEARMAN: No question it has to be  
14 dealt with in the charge. I am not asking Your  
15 Honor to explain it to the jury now.

16 THE COURT: I will look at your order.  
17 As I say, we are on the same track as to liability.

18 MR. BEARMAN: We are, and I appreciate  
19 it, and that is all I have got.

20 (Mr. Curtis Johnson enters the  
21 courtroom.)

22 MR. CHASE: As we indicated yesterday,  
23 Brown and Williamson has the same circumstance in  
24 the Newcomb case. Not to belabor that, we will  
5438

1 just follow the same outline given that our product  
2 was used by him in the 60's and 70's.

3 That takes me to the last thing that I  
4 can remember we had, and I am glad Mr. Johnson is  
5 back with us. I hope he is feeling better. That  
6 had to do with the Settle matter.

7 THE COURT: We were looking at the law on  
8 the question of the statute of repose with regard  
9 to the Settle matter.

10 MR. CURTIS JOHNSON: I wanted to let the  
11 court know that we did not have any additional law  
12 in regard to that particular point. So, I think I  
13 understand the court's ruling in that regard. So,  
14 I didn't want to belabor the point, but I wanted to  
15 make sure I let you know that we did not have any  
16 additional law on it.

17 THE COURT: Then, I think that the  
18 six-year period would apply in that case. And,  
19 accordingly, I would direct a verdict in the Settle  
20 case.

21 MR. CHASE: Given that ruling, Your  
22 Honor, I will submit an order to Mr. Johnson. We  
23 tried to come up with what might be a concept of  
24 what you might tell the jury at this point in time  
5439

1 when they come back in, being that the defendants  
2 are starting their case, and the Settle case is no  
3 longer here. And if I cannot --

4 THE COURT: Is it something you all have  
5 agreed on?

6 MR. CHASE: I have it here. This is the  
7 only copy I have got.

8 MR. HARDY: I have got one I can give  
9 them.

10 MR. CHASE: Maybe, while Mr. Hardy does  
11 that, I would appreciate it if Your Honor would  
12 look at that.

13 MR. CURTIS JOHNSON: I might have one  
14 minor addition. I think we can submit an order  
15 after the break.

16 THE COURT: Tell me what you are talking  
17 about because I want to bring the jury on in, even  
18 though we have only got 15 minutes to go before  
19 lunch.

20 MR. CURTIS JOHNSON: In regard to the  
21 second paragraph of the order, it says the  
22 complaint of Ruby Settle, individually, on behalf  
23 of the estate of Raymond Settle against Brown and  
24 Williamson Corporation be --  
5440

1 THE COURT: I am sorry. You are going  
2 too fast. Would you start over please?

3 MR. CHASE: There are multiple copies, if  
4 you want to hand one of those up to the judge. In  
5 fact, that is good. You have given him the  
6 original.

7 THE COURT: What was your comment now,  
8 Mr. Johnson?

9 MR. CURTIS JOHNSON: I was going to  
10 discuss with Mr. Chase the issue of costs being  
11 assessed against the plaintiff. I was just going  
12 to suggest that we would have a paragraph saying  
13 that each party would bear their own costs.

14 THE COURT: I don't want to get into a  
15 discussion about the cost question. If you all  
16 reach an agreement on it, otherwise, the court will  
17 rule on it. Mr. Chase.

18 MR. CHASE: I don't know what the  
19 company's policy is about that, and I can find out.

20 THE COURT: We can hold that and come  
21 back to it.

22 What about the statement that Mr. Chase  
23 has prepared is what I was asking about?

24 MS. FLORENCE JOHNSON: We don't have any  
5441

1 objection to it, Your Honor.

2 MR. CHASE: Thank you.

3 THE COURT: Okay. I am just going to  
4 change it in one respect. And, instead of saying,



5 as a matter of law, I am going to say, as a result  
6 of certain requirements of law.

7 Do you have any problem with that, Mr.  
8 Chase?

9 MR. CHASE: No, sir.

10 THE COURT: Now, what is the first order  
11 of proof?

12 MR. HARDY: The defendants will call Dr.  
13 Jeff Norrell, historian, to the stand. That is our  
14 first order of proof, Your Honor.

15 And I might say, in view of the court's  
16 inquiry, just to be sure it is on the record as to  
17 what our further order of proof is going into next  
18 week, our second witness will be Dr. David Townsend  
19 from R.J. Reynolds. And our third witness will be  
20 a toxicologist named Richard Thomas. And I think  
21 that will take us through next week.

22 THE COURT: All right. Now, one of our  
23 jurors has to be out half a day in the afternoon of  
24 next Thursday. So, we will only work a half day

5442  
1 next Thursday.

2 MR. BEARMAN: First half or the second  
3 half?

4 THE COURT: First half.

5 MR. BEARMAN: Thank you.

6 THE COURT: Well, we will take advantage  
7 of these few minutes. Mr. Chase would you get --  
8 at least if I get this witness on the stand, at  
9 least I will get the sense of motion and we won't  
10 feel spooked.

11 MR. BEARMAN: We're committed then.

12 (Whereupon, the jury is seated in the  
13 jury box.)

14 THE COURT: Good afternoon, ladies and  
15 gentlemen. I thank you for your patience. And we  
16 did work until almost 5:00, actually 5:15,  
17 yesterday. But we made a lot of progress on these  
18 matters, and we have been working this morning.

19 And, so, again, we appreciate your  
20 patience, and we are ready to start with the  
21 presentation now of the proof by the defendants.

22 Let me tell you that in one of the  
23 lawsuits, and that would be the case of Ruby  
24 Settle, individually, and on behalf of the estate

5443  
1 of Raymond Settle as plaintiffs versus Brown and  
2 Williamson Tobacco Company, that the court has  
3 dismissed the lawsuit of Ruby Settle on behalf of  
4 Raymond Settle as a result of certain requirements  
5 of law.

6 And, therefore, the case of Ruby Settle  
7 on behalf of Raymond Settle against Brown and  
8 Williamson Tobacco Company is no longer before  
9 you.

10 Now, the fact that I have dismissed this  
11 one lawsuit relates in no way to the other three  
12 lawsuits. And, so, you should continue to consider  
13 the evidence as it has been offered and as it will  
14 be offered in the three remaining lawsuits.

15 All right. At this time, we will call on  
16 the defense.

17 MR. HARDY: Your Honor, if it please the

18 court, the defendants call Dr. Jeff Norrell.  
19 SHERIFF HOUSTON: Turn this way, face the  
20 judge and raise your right hand.  
21 THE COURT: Do you swear or affirm the  
22 statements you make will be the truth, the whole  
23 truth, and nothing but the truth?  
24 THE WITNESS: Yes, I do.

5444

1 SHERIFF HOUSTON: Be seated here, please.

2

3 DIRECT EXAMINATION

4 BY MR. HANTHORN:

5 Q. Good afternoon, Dr. Norrell?

6 A. Good afternoon.

7 Q. Would you please pull the microphone  
8 close enough to you so that I can hear you back  
9 here. State your full name for the record.

10 A. My name is Robert J. Norrell.

11 Q. What is your current occupation, Doctor?

12 A. I am professor of history at the  
13 University of Tennessee.

14 Q. How long have you been teaching history?

15 A. I have been teaching history about almost  
16 20 years, 19 or 20 years.

17 Q. How long have you been teaching at the  
18 University of Tennessee?

19 A. Since August of 1998.

20 Q. Before August of 1998, where were you are  
21 teaching?

22 A. I was at the University of Alabama,  
23 Tuscaloosa.

24 Q. Now, you are here to provide the jury

5445

1 with your expert opinions as a historian on the  
2 issue of public awareness about cigarette smoking  
3 and potential health risk associated with cigarette  
4 smoking; is that correct, sir?

5 A. Yes, sir.

6 Q. Now, before we get to those opinions, I  
7 would like for you to give the court and the jury  
8 some specifics about your professional background  
9 and experience.

10 A. Okay.

11 Q. First, what degrees do you hold?

12 A. I hold a bachelors degrees and a masters  
13 degree and a Ph.D., all in history, all from the  
14 University of Virginia.

15 Q. And when did you earn those degrees from  
16 the University of Virginia?

17 A. I got the bachelors degree in 1974, the  
18 masters degree in 1978, and the Ph.D. in 1983.

19 Q. Would you explain briefly for the jury  
20 the training and education one has to have in order  
21 to become a professional historian?

22 A. Well, a professional historian has to go  
23 to graduate school and get a graduate degree or  
24 two. And that involves taking graduate courses

5446

1 where you read lots of books and write lots of  
2 papers. In my case -- in most cases, about three  
3 years of courses.

4 And, then, you have to write a doctoral  
5 dissertation, which is essentially writing a book

6 about a subject on which nothing or no book has yet  
7 been written.

8 Q. This may seem to be a simple question.  
9 But what is history?

10 A. Well, history is the study of change over  
11 time and how people have remembered what has  
12 happened in the past.

13 Q. So, is it just, then, the study of names  
14 and dates?

15 A. Well, I try not to make it the  
16 memorization of names and dates. History is the  
17 experience of people, both the famous and the  
18 common people, what they have experienced, how they  
19 have felt about it, and how their experiences have  
20 changed over time.

21 Q. Have you, sir, written any books in the  
22 field of history?

23 A. Yes.

24 Q. Approximately how many?

5447

1 A. About nine.

2 Q. Have you written any school textbooks in  
3 the area of history?

4 A. Yes. I have written three state history  
5 textbooks on the history of Alabama that are used  
6 in public schools.

7 Q. And, are those fourth grade and ninth  
8 grade textbooks?

9 A. Yes. Two of them are for the fourth  
10 grade. One is for ninth graders.

11 Q. To make sure we are giving credit to all  
12 unknown co-authors, did any of your five children  
13 help you write these books?

14 A. You have actually given me one more child  
15 than I have. I have four. They have all helped in  
16 various ways in terms of helping me select  
17 pictures, helping me, that what I say is of  
18 interest to a child.

19 Q. Now, have you also written scholarly  
20 articles to be reviewed and read by other  
21 historians?

22 A. Yes.

23 Q. Have those articles been published in a  
24 peer review of the journals?

5448

1 A. Yes. In journals like the Journal of  
2 Southern History, the Journal of American History,  
3 journals like that.

4 Q. Would you explain, just briefly, what  
5 peer review process is or what it means?

6 A. Well, a peer review article, or a peer  
7 review journal, is a journal that takes articles  
8 that are submitted for, possibly for publication,  
9 and sends them out to other scholars who have  
10 expertise in the same area. And those scholars  
11 make judgment about whether they are correct and  
12 whether they are worthy of publication.

13 Q. Do articles frequently change as a result  
14 of feedback during this process?

15 A. Yes. Typically, somebody will make a  
16 good suggestion, maybe they have -- know of a  
17 source that I didn't know of. Or, I, as a peer  
18 reviewer, might know of a source for somebody else

19 as I am reviewing.

20 Q. You have been a peer reviewer as well as

21 having your own work peer reviewed?

22 A. Yes, I have.

23 Q. Is there any difference in the level of

24 work and research and checking that goes into a

5449 1 speech at a symposium as a result of a peer review

2 article?

3 A. Yes. A lot of times, when you are just

4 making a talk at a meeting, the references are not

5 necessarily provided. You don't have footnotes a

6 lot of the times. And you are not held to as high

7 a standard of scholarly objectivity as, perhaps,

8 you would be -- as you would be in a journal

9 article.

10 Q. Now, other than your writing with respect

11 to textbooks and your peer review publications,

12 have you written any other things that have

13 appeared in print or on various media about

14 history?

15 A. Yes. I have written a lot of -- a good

16 many encyclopedia articles. I did the entry on

17 Alabama in the Encyclopedia Britanica in the 1990

18 edition, and one for Grolier's Encyclopedia.

19 And I have done a number of entries for

20 the Encarta CD Rom Encyclopedia. I did the entry

21 on Dr. King and on Civil Rights movement, about

22 nine, I think, entries Encarta Encyclopedia, which

23 are used in a lot of schools.

24 Q. Have your writings achieved any honors or

5450 1 awards?

2 A. Yes. I was given the Mellon Research

3 Fellowship American History at Cambridge University

4 in 1984 and '85, which was basically based on my

5 dissertation. And when my dissertation was

6 published, it won the Robert F. Candy Book Prize in

7 1986.

8 Q. Are you a member of any history societies

9 or groups?

10 A. Yes.

11 Q. And what are some of those?

12 A. The Southern Historical Association, the

13 Alabama Historical Association, Tennessee

14 Historical Association, the Organization of

15 American Historians.

16 Q. What position do you currently hold at

17 the University of Tennessee?

18 A. I am the Bernadotte Schmitt Chair of

19 Excellence in History. I hold that position.

20 Q. And what is a chair of excellence in a

21 particular field?

22 A. Well, it is an endowed chair. An endowed

23 chair is a professorship that is established when

24 somebody gives money, basically, to pay for the

5451 1 salary and support of the position. And there are

2 some of those, and I got one. I was invited to

3 apply for one of them and received it.

4 (Exhibit Number 152, Dr. Norrell's

5 Curriculum Vitae, was marked for identification.)

6 MR. HANTHORN: If I could have a document

7 that has previously been marked as 152.  
8 And, in keeping with the procedure we had  
9 yesterday, the witness has seen it. We don't need  
10 to have it remarked.

11 Q. BY MR. HANTHORN: Is this a copy of your  
12 dissertation and does it accurately reflect your  
13 professional background?

14 A. Yes.

15 Q. I am sorry. A copy of your curriculum  
16 vitae.

17 THE COURT: I gather that, pursuant to  
18 that procedure, there are no objections?

19 MR. HANTHORN: I presume that is the  
20 case. The document is behind tab 1 in the binder  
21 we provided.

22 MS. FLORENCE JOHNSON: No objection.

23 Q. BY MR. HANTHORN: Dr. Mauer, using your  
24 dissertation as an example, I want to you describe  
5452

1 for the jury how a historian uses the historical  
2 method to investigate the impact of events on the  
3 day-to-day lives of people. First, what was the  
4 focus or the topic of your dissertation?

5 A. Well, my dissertation is a study of the  
6 Civil Rights Movement in Tuskegee, Alabama. I grew  
7 up in Alabama in the 1960's and was very interested  
8 in the racial divisions and events of that  
9 interesting period.

10 And I wanted to write a dissertation that  
11 was about the experience of average Alabamians,  
12 black and white, going through the Civil Rights  
13 Movement, and that is what I did.

14 The study, I pursued the same kind of  
15 approach or method for doing the dissertation that  
16 I think scholars typically do in history, anyway,  
17 in undertaking any study, which is, first, I read  
18 the secondary literature, the books and articles  
19 that had been written by historians about the  
20 subject.

21 And then I went on to read what we call  
22 the prior documents, which are the documents which  
23 were written at the time, like newspapers, magazine  
24 articles, government documents, letters, diaries,  
5453

1 papers from organizations, that sort of thing.

2 Q. Where available, did you also review  
3 video or television archive materials?

4 A. Yes, I did.

5 Q. Where available, did you also review  
6 polling data or information?

7 A. Yes, I certainly did.

8 Q. Why do you review all of this information  
9 when taking a broad topic like Civil Rights and  
10 applying it to a particular place or a particular  
11 individual, as Tuskegee, Alabama?

12 A. Well, in order to understand the full  
13 meaning and to offer as intelligent an account of  
14 what happened, you need to use as many sources as  
15 you can. But you also need to read those sources,  
16 critically, and to make assessments about what are  
17 the debates and disagreements in the historical  
18 record.

19 Q. Now, are historians like yourself

20 qualified and trained in particular to study and  
21 analyze the past?  
22 A. I believe so, yes.  
23 Q. And, what particular types of common  
24 errors are historians qualified and trained to  
5454  
1 avoid?  
2 A. Well, historians are trained to avoid  
3 explaining an event out of its proper context.  
4 We're trained to try to explain events -- to try to  
5 avoid bias in explaining why things happen.  
6 We're trained to try to avoid looking at  
7 the past too much from today's perspective or with  
8 20/20 hindsight. Those are just some of the errors  
9 that I caution my students not to make.  
10 Q. Let's take those one at a time, beginning  
11 with context, not taking events out of their proper  
12 context. Why is it important to pay attention to  
13 context?  
14 A. Well, if you don't pay attention to  
15 context, you might accept a wrong explanation for  
16 an important event or take a single explanation  
17 that misses some other things that were going on.  
18 Q. Can you give us an example of how that  
19 works and why it is important not to put it in  
20 context?  
21 A. Well, I can give you an example. We  
22 would often hear that Memphis is the home of rock  
23 and roll, and we typically -- just, if you go to  
24 Graceland, you will have it explained that Memphis  
5455  
1 is the home of rock and roll because Elvis Presley  
2 made Memphis the home of rock and roll.  
3 But, if you study the context in which  
4 Elvis Presley emerged, you will find that, in fact,  
5 there were important music transitions already  
6 here, rhythm and blues, and country music, and  
7 gospel music, all of which provided the environment  
8 for which somebody could develop a powerful new  
9 form of entertainment that came to be known as rock  
10 and roll.  
11 Elvis Presley was just the most famous  
12 person to emerge from the Memphis context. In a  
13 sense, Memphis made Elvis the king of rock and  
14 roll, not Elvis made Memphis the home of rock and  
15 roll.  
16 Q. Can you give us an example from your  
17 historical research about how, to a historian,  
18 events that might seem to be unrelated, when placed  
19 in proper context, take on new meaning?  
20 A. Well, one example that I use with my  
21 students about that, about another context example,  
22 is one of the questions that I have always been  
23 interested in, is why did we get the Civil Act of  
24 1964.  
5456  
1 MS. FLORENCE JOHNSON: Objection, Your  
2 Honor. The witness is not being responsive to the  
3 question asked.  
4 THE COURT: Overruled.  
5 MR. HANTHORN: You may continue.  
6 THE WITNESS: This question about why the  
7 Civil Rights Act succeeded the Civil Rights

8 Movement succeeded with the passage of the Civil  
9 Rights Act of 1964 and the Voting Rights Act of  
10 1965 is, I think, a very important question and one  
11 that I try to get students to think about.

12 A seemingly unrelated event that I think  
13 connects to it was the expansion of television news  
14 from 15 minute to 30-minute programs in 19 -- about  
15 1962 and 1963. With the expansion of television  
16 news, the news networks needed more film just at  
17 the moment when there were important visual  
18 representations of racial conflict in the South.

19 Those events made it on the television  
20 and built a much larger national support for change  
21 with race relations that led to the Civil Rights  
22 Act of '64 and '65.

23 So, an unrelated event, the expansion of  
24 television news, was very important to helping us

5457

1 understand the Civil Rights Movement.

2 Q. You have discussed context. I believe  
3 that the second type of area you talked about was  
4 attempting to avoid or detect bias. Can you tell  
5 me what that is about, sir?

6 A. Well, bias is what we commonly -- what we  
7 know it is. It is seeing things in your own  
8 perspective. In a historical right of history bias  
9 is where somebody explains events in a certain way  
10 from their very own personal bias perspective.

11 Q. What would an example of that be?

12 A. Well, the example might be a general  
13 writing about a battle that he had fought in and  
14 that he had lost might say he lost the battle  
15 because the Air Force didn't provide enough air  
16 support.

17 A historian using his, the general's,  
18 point of view, but also many others, might offer a  
19 much different one, an explanation for the same  
20 defeat using other perspectives, and might, in  
21 fact, identify that the general had made some  
22 mistakes that resulted in the defeat.

23 So, it is important to look carefully at  
24 the bias of any particular source.

5458

1 Q. I believe the third area that you  
2 mentioned avoiding was looking at the past too much  
3 through our own eyes or present. Would you give me  
4 an example of what that concept involves?

5 A. Well, it is very difficult not to use  
6 today's environment to explain things that happen  
7 in the past, like 20/20 hindsight. One of the  
8 examples that I have used with my students is that  
9 we wonder, if we look back at the 1950's, for  
10 example, why so many Americans were driving these  
11 gigantic cars, eight cylinders, drive fast. It  
12 seems hopelessly sort of wasteful and silly and  
13 stupid, some people might say.

14 And we think that because we know that  
15 gasoline was going to get far more expensive, and a  
16 lot of other things, people in the 1950's did not  
17 know that when gasoline was 25 cents a gallon in  
18 1950 or that it was going to go over a dollar in  
19 the late 1970.

20 They weren't aware that people were going

21 to get very concerned about air pollution coming  
22 from automobiles in the 1960's. People in the  
23 1950's did not know the Japanese were going to be  
24 able to come in with their smaller, more efficient

5459

1 automobiles and take a large share of the  
2 automobile market.

3 So, from the perspectives of the 1950's,  
4 if you look just in that context, we can understand  
5 why people drove big cars, when, from today, if we  
6 just use today's values, we may not understand.

7 MR. HANTHORN: Your Honor, we could take  
8 a convenient break here, or we will be happy to  
9 continue going. It is your decision.

10 THE COURT: This will be a good time for  
11 us to take our lunch and recess. Sheriff, we will  
12 come back at 2:15.

13 (Whereupon, at 12:43 p.m., a lunch recess  
14 was taken.)

15 (Whereupon, there was a change in court  
16 reporters.)

17

18

19

20

21

22

23

24

5460

1 CERTIFICATE OF REPORTER

2

3 I, Barbara W. Barron, do hereby certify that  
4 the foregoing proceedings were taken by me in  
5 stenotype to the best of my ability, and thereafter  
6 reduced to typewriting under my supervision; that I  
7 am neither counsel for, related to, nor employed by  
8 any of the parties to the action in which these  
9 proceedings were taken; and further, that I am not  
10 a relative or employee of any attorney or counsel  
11 employed by the parties hereto, nor financially or  
12 otherwise interested in the outcome of the action.

13

14

15

16

Barbara W. Barron  
Notary Public in and for  
the State of Tennessee

17

18

My Commission Expires:  
February 1, 2003

19

20

21

22

23

24

5461

1 INDEX OF PROCEEDINGS  
2 March 18, 1999 - Vol. 35  
3 (Morning Session)

4

5

PAGE

6

Arguments regarding Motions for



Directed Verdict..... 5487

DEFENDANTS' WITNESS:

DR. ROBERT J. NORRELL

DIRECT EXAMINATION BY: MR. HANTHORN..... 5440

E X H I B I T S

MARKED FOR IDENTIFICATION

PAGE

Exhibit Number 152, Dr. Norrell's Curriculum  
Vitae.....

5447

RECEIVED INTO EVIDENCE

PAGE